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No. 18,240

In The

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JANE G. WEST and RALPH E. WEST,

Appellants,

vs.

RUTH SHIZUKO TAN, individually and doing business as BANYAN INN,

Appellee.

PETITION FOR REHEARING

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Appellants hereby petition this Court for rehearing after decision of this Court, dated September 23, 1963. Said decision determined that plaintiff wife was a bare licensee while playing a piano in defendant's restaurant and that she could not, for that reason, recover.

Grounds for Rehearing

Rehearing is sought upon the ground that, while there is substantial evidence to support a conclusion that plaintiff was a licensee, which said evidence is summarized in the decision of this Court, there is equally substantial evidence to support the jury's determination that plaintiff was an invitee. This latter evidence, possibly, was not heretofore brought clearly to the attention of this Court, since the same does not appear in the

said decision.

The Evidence

The evidence supporting the jury's implied finding that plaintiff was an invitee may be summarized as follows:

1. The area involved here was a part of the public dance area, separated therefrom only by a single step.

2. There was no barricade or fence between the admittedly public dance area and the piano played by plaintiff.

3. The piano was so located as to be immediately available to patrons, without being moved or prepared in any way.

4. A chair for the piano was left available.

5. A light was left available.

6. The absence of any sign in the questioned area forbidding entrance thereto was affirmatively shown.

7. The failure of defendant to object to the piano playing, though she was fully aware of the same, was affirmatively shown.

8. The fact that defendant's waitress affirmatively encouraged plaintiff to play the piano was shown.

9. It was shown that this was not a formal type of restaurant; the "rule" was informality, so that plaintiff's piano-playing was quite in keeping with the "nature of the business."

10. Plaintiff's presence in the questioned area did serve defendant's interests: Other guests of defendant listened to, and enjoyed, plaintiff's piano playing. Further, the very reason that plaintiff went to defendat's restaurant rather than to another restaurant was because there was a piano available there.

The Law

It is respectfully submitted that the foregoing evidence clearly brings plaintiff within the definition of an invitee, rather than a licensee, as defined by the very authorities cited in this Court's decision (Restatement of Torts and Prosser on Torts).

Prosser states at page 445, et seq., that a licensee is one who enters with consent

> "* * * and nothing more. Such a person is not a trespasser, but he comes for his own purposes rather than for any purpose or interest of the landholder."

> "* * * the duty of affirmative care in making the premises safe is imposed upon the man in possession as the price he must pay for the economic benefit he derives, or expects to derive from the presence of the visitor; and that when no such benefit is to be found, he is under no such duty. On this basis the 'business' on which the visitor comes must be one of at least potential pecuniary profit to the possessor." (page 453; emphasis added)

> "* * * The special obligation toward invitees exists only while the visitor is upon the part of the premises which the occupier has thrown open to him for the purpose which makes him an invitee. This 'area of invitation' will of course vary with the circumstances of the case. * * * [I]t extends to all parts of the premises to which the purpose may reasonably be expected to take him, and to those which are so arranged as to lead him reasonably to think that they are open to him. * * * If the customer is invited or encouraged to go to an unusual part of the premises, such as behind a counter or into a storeroom, for the purpose which has brought him, he remains an invitee; but if he goes without such encouragement and solely on his own initiative, he is only a licensee * * * ." (page 458; emphasis added)

Simiarly, the Restatement of Torts, Sec. 343, comment (b), cited by this Court, states:

> "Under the rule stated in this section a possessor of land is subject to liability to another as a business visitor only for such bodily harm as he sustains while upon a part of the land upon which the possessor gives the other reason to believe that his presence is permitted or desired because

of its connection with the business or affairs of the possessor and which as such is held open to the other as a business visitor. In determining the area included in a business invitation, the nature of the business to be transacted is of great importance. * * * Where it is customary that customers or patrons shall be free to go to certain parts of the premises, the customer or patron is a business visitor thereon unless the possessor exercises reasonable care to apprise the customer or patron that the area of invitation is more narrowly restricted." (Emphasis added)

Conclusion

It is respectfully submitted that even though there is substantial evidence from which the Court might find that plaintiff was a licensee in the questioned area, nevertheless there is abundant evidence to support the implied determination of the jury to the contrary.

Prior decisions of this Court, heretofore cited, along with a host of decisions from other jurisdictions heretofore cited, have uniformly held that the question of whether a plaintiff is an invitee or a licensee is a question of fact, to be determined by the jury.

Here the jury has found that plaintiff was an invitee. There is substantial evidence to support that determination. Under such circumstances, we submit the Court is bound by such determination unless the purpose of the jury system be held to be totally meaningless.

Respectfully submitted,

SULLIVAN, ROCHE, JOHNSON & FARRAHER
AXEL J. ØRNELLES

By _____
Attorneys for Appellants

C E R T I F I C A T E

Pursuant to Rule 23 of the Rules of this Court, the undersigned hereby certifies that he is one of the attorneys for appellant herein.

That the foregoing Petition for Rehearing is well founded, and is not interposed for delay.

DATED: October 14, 1963.

Gerald J. O'Connor